Utah Ethics Opinions

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107. USB EAOC Opinion No. 107

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 107

Approved February 15, 1992

Issue: Is a lawyer subject to disciplinary action for pursuing a matter in which he has a conflict of interest or which may otherwise be a violation of the Rules of Professional Conduct when the lawyer has sought to be excused from the court appointment and the court has denied the motion?

Opinion: A lawyer aggrieved by the necessity of accepting a court appointed representation under such circumstances must accept the appointment. But at the same time he or she diligently pursues the client's cause, a review of the trial judge's appointment may be sought. The nature of that review would depend upon the nature and circumstances of the litigation and the gravity and seriousness of the conflict. The question of whether a lawyer might be disciplined, notwithstanding the court's refusal to grant a motion to withdraw on the basis of such conflict, must be dealt with on a case-by-case basis. However, it is unlikely that the Utah State Bar would pursue disciplinary action where the lawyer acted in good faith, diligently sought review from the trial court, and pursued whatever remedies might be appropriate before the Bar, through Bar Counsel, or in appellate or other courts.

Analysis of Authority: Generally a lawyer must accept and not avoid court-appointed representation for indigent clients. Rule 6.2, *Accepting Appointments*, of the Rules of Professional Conduct for the Utah State Bar, states as follows:

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) Representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) Representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) The client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client.

In interpreting the ABA Model Rule 6.2, which is identical to the rule of the Utah State Bar dealing with accepting appointments, the courts have held: "Except in unusual circumstances (a lawyer) has no right . . . to refuse a case which he is requested to take by a Judge of the court for whom he regularly appears . . . ."1

Under both the Utah and the ABA Model Rule, a lawyer is justified in declining a court appointment if the lawyer has "good cause" for doing so. "Good cause" has been found where the appointment would likely result in a violation of ethics rules or other law-for example, conflicting interests among defendants jointly represented2 or if the lawyer has insufficient competence;3 and risk of improper use of information relating to representation.4 Special consideration may be given for appointments to assist a defendant on an appeal.5

Another example of "good cause" for refusing appointment is where the financial hardship on appointed counsel becomes prohibitively burdensome.6 Whether a financial burden is "unreasonable" must depend on the facts of each case.7

Although the Utah courts have not determined whether financial hardship on appointed counsel is good cause for refusing appointment, the Utah Supreme Court has held that a failure to pay an attorney may amount to an unconstitutional taking of property without compensation.8 In that case an attorney was appointed by the court pursuant to statute to represent a mental patient, but no provision was made for payment of that attorney. The court found that failure to provide a mechanism for payment of attorney's fees of counsel appointed by the court constitutes a taking of the attorney's property without giving just compensation and as such the statute was unconstitutional.

The repugnance of the client or the cause to the lawyer if such repugnance were so compelling that it detrimentally affected representation provided by the appointed lawyer may also be grounds to avoid court appointment. A lawyer should decline to represent a client if the intensity of his personal feelings may impair his effective representation.9

If grounds exist to decline an appointment, the lawyer should not defy the order, but should seek review by appeal or other procedure.10 As a practical matter, a request by the lawyer for an informal (or formal) review by Bar Counsel might be the most appropriate step to take prior to resorting to burdensome appellate or other extraordinary action. Such a request might well result in a resolution of the lawyer's dilemma or at least provide needed direction as to the

proper course to be followed under the circumstances.

Any other course of action includes the risk of sanctions or discipline. A case in point is the Tennessee lawyer who refused to accept an otherwise valid court appointment to represent a criminal defendant on the grounds that a state ethics opinion indicated that such acceptance would be unethical. The Supreme Court of Tennessee held that the lawyer was properly held in contempt of court, reasoning that ethics opinions issued by the Tennessee Board of Professional Responsibility are not binding upon the court and do not have the force of law. In that case the lawyer, whose partner was a county attorney, was appointed to represent a criminal defendant. He informed the court that he would have to decline the appointment based upon his reading of Tennessee Ethics Opinion 83-F-41 barring lawyers whose law partners are county attorneys from representing criminal defendants being prosecuting by county officers. The trial judge found the conflict insufficient to prevent the appointment or to adversely affect the lawyer's ability to represent the defendant zealously. He found the lawyer in contempt, sentenced him to five days in jail, a ten dollar fine, and suspended the jail sentence upon payment of the fine and costs. The Tennessee Court of Criminal Appeals affirmed.11

Conclusion: Accordingly, it is the conclusion of the Committee that a lawyer aggrieved by the necessity of accepting an appointment to represent an indigent client is under obligation to the court to accept the appointment but at the same time he or she diligently pursues the client's cause, a review of the propriety of the trial judge's appointment may be sought. The lawyer who questions the propriety of the appointment has the burden of showing that the conflict exists before the court.

Because of the unlimited potential for conflicts, this Committee cannot presume to anticipate the facts and circumstances of all cases that may arise and cannot categorically state that disciplinary action might not be taken in a proper case. Such would be the circumstance even though the lawyer pursues a motion to be relieved of the appointment based upon good cause as set forth in Rules of Professional Conduct 6.2. However, it is unlikely that the Utah State Bar would pursue disciplinary action where the lawyer acted in good faith, sought relief from the trial court, and pursued whatever remedies might be appropriate before the State Bar and in appellate or other courts.

Footnotes

1. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143 (1966), cert. denied, 385 U.S. 958 (1966); *see also Powell v. Alabama*, 287 U.S. 45, 73 (1932) ("Attorneys are officers of the court, and are bound to render service when required by such appointment.")

2. *Glasser v. U.S.*, 315 U.S. 60 (1942); *Baker v. State*, 202 So. 2d 563 (Fla 1967); *Sowa v. Sommerville*, 280 S.E.2d 85 (W. Va. 1981).

3. *Easley v. State*, 334 So. 2d 630 (Fla. Dist. Ct. App. 1976).

4. *State v. Gasen*, 48 Ohio App. 2d 191, 356 N.E.2d 505 (1976); *People v. Curry*, 1 Ill. App. 2d 87, 272 N.E.2d 669 (1971); *State v. Hilton*, 217 Kan. 694, 538 P.2d 977 (1975); *Partain v. Oakley*, 227 S.E.2d 314 (W. Va. 1976).

5. *See Anders v. California*, 386 U.S. 738 (1967); *People v. Hoffman*, 382 Mich. 66, 168 N.W.2d 229 (1969).

6. *People v. Randolph*, 35 Ill. 2d 24, 219 N.E.2d 337 (1966); *Brown v. Board of County Commissioners*, 85 Nev. 149, 451 P.2d 708 (1969).

7. *Compare People v. Randolph*, 35 Ill. 2d 24, 219 N.E.2d 337 (1966), with *People v. Sanders*, 58 Ill. 2d 196, 317 N.E.2d 552 (1974), and *Edgerly v. Commonwealth*, 379 Mass. 183, 396 N.E.2d 453 (1979).

8. *Bedford v. Salt Lake City*, 447 P.2d 193 (Utah 1968).

9. *See Riley v. District Court*, 181 Colo. 90, 507 P.2d 464 (1973).

10. *See Easely v. State*, 334 So. 2d 630 (Fla. Dist. Ct. App. 1976); *In re Spann*, 183 N.J. Super. 62, 443 A.2d 239 (1982); *State v. Frankel*, 119 N.J. Super. 579, 293 A.2d 196 (1972); *In re Lanza*, 16 A.D.2d 336, 227 N.Y.S.2d 687 (1962).

11. *State v. Jones in re: Larry S. Banks*, 726 S.W.2d 515(1987).

Rule Cited:

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